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SIPDIS

DEPARTMENT FOR AF/S, EB/TPP  
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E.O. 12958: N/A  
ETRD, ECON, EINV, EFIN, ECPS, SF  
SUBJECT: SOUTH AFRICA: INPUT FOR THE 2006 NATIONAL TRADE  
ESTIMATE REPORT

REF: STATE 188246

NOT FOR INTERNET DISTRIBUTION

¶1. What follows is post's response for input for the 2006 National Trade Estimates Report as requested in reftel. Per instructions, this has also been sent in Microsoft Word format via electronic mail to William Jackson and Gloria Blue in the Office of the United States Trade Representative.

#### IMPORT POLICIES -----

¶2. Tasked with efficiently and effectively administering South African trade laws, the International Trade Administration Commission (ITAC) replaced the Board on Tariffs and Trade in June 2003. ITAC's specific responsibilities include:

- Tariff Administration: ITAC administers tariff-related programs, including the Motor Industry Development Program (MIDP) and the Duty Credit Certificate System (DCCS). In addition, interested parties may petition ITAC to review tariffs with the purpose of reducing or increasing them;
- Trade Remedies: ITAC administers antidumping and countervailing duties and safeguards. Although introduced in 2004, safeguard procedures have not been tested. The textiles and clothing industry is reportedly putting together several petitions in light of rising Chinese imports; and
- Import and Export Control: ITAC issues import and export permits for certain items designated by the Minister of Trade and Industry under the authority of the International Trade Administration Act of 2002 (which replaced the Import and Export Control Act of 1963).

#### Import Control -----

¶3. The Minister of Trade and Industry may, by notice in the Government Gazette, prescribe that no goods of a specified class or kind be imported into South Africa, except under the authority of, and in accordance with, the conditions stated in a permit issued by ITAC. The main categories of controlled imports are as follows:

- Used goods: ITAC may grant import permits on used goods or substitutes if not manufactured domestically, thus creating a de facto ban on most used goods. While designed to protect the domestic manufacture of clothing, motor vehicles, machinery, and plastics, these restrictions limit

imports of a variety of low-cost used goods from the United States and Europe;

- Waste, scrap, ashes, and residues: The objective of import controls on these goods is to protect human health and the environment under the Basel Convention;
- Other harmful substances: Imports of substances such as ozone depleting chemicals under the Montreal Convention and chemicals used in illegal drug manufacturing under the 1988 United Nations Convention are controlled for environmental, health, and social reasons; and
- Goods subject to quality specifications: This restriction permits the monitoring of manufacturing specifications that enhance vehicle safety (such as in the case of tires) or protect human life.

#### Tariffs

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14. ITAC continues to receive requests for tariff protection from a number of industries and U.S. companies have cited protective tariffs as a barrier to trade. Other barriers to trade often cited include port congestion, customs valuation above invoice prices, theft of goods, import permits, antidumping measures, IPR crime, an inefficient bureaucracy, and excessive regulation.

15. Under SACU, products from Botswana, Lesotho, Swaziland, and Namibia enter South Africa duty-free. In a few cases, products from these countries compete directly with U.S. goods that are subject to duties. One

example is soda ash imported from Botswana at a zero duty while soda ash from the United States faces a 5.5 percent duty. The soda ash duty benefits Botswana, the only producer of soda ash within SACU. A standing complaint from this producer to South Africa's Competition Commission law has threatened to block all U.S. exports of soda ash. Initially, the Competition Commission accepted the complaint as a "per se" offense, but a recent decision by the South African Supreme Court of Appeal remanded the case to the Competition Commission to confirm that U.S. exports have actually damaged the South African market. As of late 2005, there the Competition Commission indicated a willingness to settle the case and avoid further litigation. If tariffs on U.S. soda ash were removed, industry estimates that U.S. exports of high quality soda ash to South Africa could increase from less than \$8 million to \$25 million, closer to its historical level.

#### Anti-Dumping

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16. The government promulgated antidumping regulations on November 14, 2003. In 2003 and 2004, local industry filed twelve antidumping petitions. In the first ten months of 2005, local industry filed ten new antidumping petitions against nineteen countries. The majority of the petitions were against Chinese firms. However, ITAC initiated an antidumping investigation into the alleged dumping of feed supplements containing lysine imported from the United States. ITAC also initiated sunset reviews of antidumping duties on frozen chicken pieces and acetaminophenol from the United States. Antidumping duties on U.S. origin suspension PVC and roller bearings remain in force, though U.S. industry and the U.S. Government have challenged the assertion of antidumping. In 2004, ITAC increased the MFN applied duty on imports of poultry offal, as requested by domestic industry.

#### Free Trade Agreement with the European Union

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¶7. In 2000, South Africa and the European Union (EU) began to implement provisions of their Trade, Development, and Cooperation Agreement (TDCA). Under the TDCA, South Africa and the EU agreed to establish a free trade area over a transitional period of up to 12 years for South Africa, and 10 years for the EU. The agreement provides for the reduction and eventual elimination of duties on approximately 85 percent of the products imported by South Africa from the EU, and 95 percent of the products exported by South Africa to the EU. The agreement exempts certain agricultural products from liberalization. Some U.S. businesses exporting to South Africa are concerned that their products will be less competitive because of EU preferences that the TDCA provides. An example includes the tariff differential between EU and U.S. bottled and bulk distilled spirits. Another is automobiles.

¶8. In November 2005, South Africa and the EU completed the work program on automobile trade as part of the TDCA. The EU agreed to phase out all tariffs on South African automotive imports by 2010. South Africa agreed to reduce tariffs on European car imports from 25 percent to 18 percent by 2012. Currently, 51 percent of South Africa's vehicle and component exports go to the EU. Given strong U.S. presence in the EU market, U.S. companies are divided on whether they are disadvantaged by the TDCA.

#### STANDARDS, TESTING, LABELING AND CERTIFICATION

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##### Apparel, Textiles, Shoes, and Leather Goods

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¶9. The Minister of Trade and Industry published regulations that prohibit the importation of or the sale of textiles, apparel, shoes, and leather goods in South Africa unless they are labeled in such a way that it is clear which country produced the goods. These regulations came into force on May 23, 2005 and required placing the South African import registration code on the label of each item. A number of companies complained, noting that simply stating the country of origin should

be enough. The South African Revenue Service (SARS) seeks to establish clear guidelines and procedures that are less onerous and, in the meantime, is not enforcing the regulations.

##### Biotechnology

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¶10. There has been an active debate in South Africa about agricultural biotechnology. The Genetically Modified Organisms Act ("the GMO Act"), entered into force in 1999, aims to ensure that all activities involving the use of agricultural biotechnology (including production, import, release, and distribution) will be carried out in such a way as to limit possible harmful consequences to the environment. Since 1999, some retail groceries have promoted a limited range of biotech-free products and a few consumer groups have urged the Department of Health to introduce compulsory labeling of biotech products.

¶11. Under the leadership of the Department of Health's Directorate of Food Control, the South African government issued labeling regulations on biotech products in early ¶2004. The regulations mandate labeling foods containing agricultural biotechnology in certain cases, including when allergens or human/animal proteins are present and when biotech food products differ significantly from a non-biotech equivalent. The rules also require validation of enhanced-characteristic claims for food containing agricultural biotechnology. The regulations do not address labeling claims that products are biotech-

free. Biotechnology advocates are concerned about this omission, noting it could lead to fraudulent claims. Trade organizations seem satisfied with the regulations, which follow internationally recognized, scientific guidelines (under CODEX). South Africa's CODEX representative comes from the Directorate of Food Control.

¶12. In November 2004, the government published draft changes to the GMO Act to bring it into compliance with the Cartagena Biosafety Protocol. The government solicited public comments on the draft changes and, as of late 2005, was still evaluating those comments.

¶13. In June 2001, the South African government published the National Biotechnology Strategy for South Africa, a document that articulated the South African government's intent to stimulate industries based on biotechnology. The document states that biotechnology can make an important contribution to achieving national priorities, particularly in the areas of human health, food security, and environmental sustainability. Environmental groups continued to exert pressure on the South African government in 2005 to examine the safety of foods derived from agricultural biotechnology.

¶14. The government approved for commercial production biotech soybeans that are tolerant to herbicides, as well as cotton, yellow maize, and white maize that are resistant to insects. Farmers are enthusiastically adopting the new technology, planting biotech crops on 500,000 hectares in 2004 and on an estimated 700,000 to one million hectares in 2005. The use of these products is widespread in the food processing industry.

¶15. U.S. grain producers raised concerns about the treatment of "stacked events" when it comes to import approval for biotech products. Although the U.S. Government considers products containing a combination of two previously approved genetic modifications (such as for insect resistance and herbicide tolerance) as "conventional," only encouraging producers to notify the U.S. government of such "stacked events," South Africa -- like the EU -- considers "stacked events" to constitute a completely new event, thus requiring a de novo review for registration purposes. This requirement creates significant delays in registering products, causing U.S. exporters to lose export opportunities.

¶16. Currently, the Government of South Africa has not approved U.S. yellow corn for importation because of its treatment of "stacked events" for approval purposes. As it stands, if yellow corn were in short supply in South Africa, importers would have to apply to the government

for a special waiver to import it, with the guarantee that the corn would be milled near the port to ensure that it cannot be planted.

¶17. In 2004, Biowatch, an environmental lobby group, took legal action against the National Department of Agriculture (NDA) to obtain information on how it made licensing decisions on biotech crops. The local courts ruled in favor of the NDA, allowing it to continue protecting certain information on a business proprietary basis.

¶18. In September 2003, countries of the Southern African Development Community (SADC), including South Africa, developed common guidelines on the regulation of products resulting from biotechnology. The guidelines assert that the region should develop common policy and regulatory systems based on either the Cartagena Protocol or the African Model Law on Biosafety. The leaders of SADC member states also agreed to develop national biotechnology policies and strategies, and to increase their efforts to establish national biosafety regulatory

systems. Leaders urged member states to commission studies on the implications of biotechnology for agriculture, the environment, public health, and socio-economics.

#### Agricultural Standards

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¶19. The South African government requires prospective importers to apply for an import permit for certain controlled products. Public Health officials still ban the importation of irradiated meat from any source. U.S. horticultural producers have complained about various South African sanitary or phytosanitary barriers when it comes to the importation of apples, cherries, and pears from the United States. They estimate that, if these barriers were removed, U.S. exports of each of these fruits to South Africa could increase by \$5 million to \$25 million in annual sales. U.S. producers have also expressed concern about unnecessary sanitary and phytosanitary requirements for some grains, pork, poultry, and horticultural products.

¶20. To fulfill South Africa's commitment under the WTO Marrakesh Agreement on market access, the National Department of Agriculture (NDA) published the rules and procedures regarding the application for market access permits for agricultural products on October 24, 2003. The NDA issues permits to importers registered with the South African Revenue Service (SARS) and the Department of Trade and Industry (DTI) for agricultural products listed in the Table of Import Arrangements. Ten percent of such permits are reserved for "new importers" (those who have not imported within the past three years), and 10 percent are reserved for small, medium, and micro-enterprises.

¶21. In response to the Bovine Spongiform Encephalopathy case in Washington State announced on December 23, 2003, South Africa banned all ruminant animals and products originating in the United States. By January 15, 2004, South Africa, in accordance with World Organization for Animal Health (OIE) standards, exempted non-risk products such as hides, skins, wool, and mohair from the ban. At the end of 2005, the ban on ruminant meat products was still in place. The South African Department of Agriculture was impressed with USDA's surveillance program, but wanted to see a full report with data from the surveillance program before lifting the ban.

#### GOVERNMENT PROCUREMENT

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¶22. Government purchases are by competitive tender for project, supply, and other contracts. The government uses its position as both buyer and lawmaker to promote the empowerment of the historically disadvantaged majority population in South Africa through its Black Economic Empowerment (BEE) policy.

¶23. South Africa's Preferential Procurement Policy Framework Act of 2000 and its implementing regulations created the legal framework and set forth a formula for evaluating bidders on government contracts. To augment

this, the Department of Trade and Industry has been working on regulations to clarify the Framework Act and incorporate the intentions of the Broad-Based Black Economic Empowerment (BEE) Act of 2003. The new regulations give greater preference to bidders of government contracts according to their compliance with BEE objectives. The regulations include BEE thresholds for tender qualification. Companies bidding on tenders valued up to R1 million will earn 80 percent of their points from their bid price and 20 percent from their commitment to BEE objectives. For tenders valued over R1 million, companies will earn 90 percent of their points



from their bid price, and 10 percent from their commitment to BEE objectives. The National Treasury is working with the Department of Trade and Industry to align preferential procurement regulations with the BEE Codes of Good Practice on Procurement, to be released for discussion in early 2006. The codes will help standardize how firms are evaluated on their compliance with industry BEE scorecards.

¶24. South Africa's Industrial Participation (IP) program, introduced in 1996, subjects all government and parastatal purchases or lease contracts (goods, equipment or services) with an imported content equal to or exceeding \$10 million (or the rand equivalent thereof) to an IP obligation. This obligation requires the seller/supplier to engage in local commercial or industrial activity equaling or exceeding 30 percent of the imported content of total goods purchased under government tender. The intent of the program is to benefit South African industry by generating new or additional business.

¶25. In August 2004, the Minister of Finance issued the BEE Code of Good Practice for Public Private Partnerships (PPPs). The code sets out BEE targets for PPPs and provides greater clarity for private sector participants. In October 2005, the Minister of Trade and Industry issued final Codes of Good Practice on BEE Equity and BEE Management.

¶26. South Africa is not a signatory to the WTO Agreement on Government Procurement.

#### INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

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##### Legal Regime

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¶27. A variety of laws and regulations protect property rights, including intellectual property rights. In 1997, the South African Parliament passed the Counterfeit Goods Act and the Intellectual Property Laws Amendment Acts. The Department of Trade and Industry (DTI) administers these acts. Although South Africa's intellectual property laws and practices generally conform with those of developed countries, there are issues with enforcement and in guaranteeing the protections afforded under these laws. The U.S. government has raised its concerns with the South African Government. The United States has also provided training on IPR enforcement to South African government and private sector representatives.

¶28. The U.S. software industry has cited three principal deficiencies in the 1978 Copyright Act:

- Lack of criminal penalties for end user piracy. South African law currently provides that the sale of infringing software is a criminal offence, but there is no criminal penalty for end users;
- Lack of presumptions relating to copyright subsistence and ownership. Amending the law to add ownership and subsistence presumptions would reduce the procedural burden on rights holders in proving their cases; and
- Non-deterrent civil damages. Amending the law to introduce statutory damages to cover end users and to ensure that monetary damages serve as a deterrent would improve IPR protection. Neither the current provisions on damages nor the application of these provisions are sufficient to serve as a deterrent to future infringement.

¶29. Until the government amends existing legislation,

the lack of evidentiary presumptions in the law will continue to complicate enforcement of individual

copyright claims.

¶30. In 2001, the South African Government introduced measures to enhance enforcement of the Counterfeit Goods Act. The government appointed more inspectors, designated more warehouses for counterfeit goods, destroyed counterfeit goods, and improved the training of customs, border police, and police officials. In 2004, there were 100 convictions for people arrested with counterfeit DVDs and computer games, compared to 14 in ¶2003. 2005 figures will only be available in March 2006. Cooperation between industry and customs authorities and police also improved. Despite these efforts, monetary losses from trademark counterfeiting and copyright piracy remain high. U.S. industry is also increasingly concerned about illegal commercial photocopying, especially at universities, libraries, and other on-campus venues. Counterfeit medicines are also a growing problem. Although law enforcement authorities often cooperate with the private sector in investigating allegations of trade in pirated or counterfeit goods, there are concerns about laxity in enforcement of IPR laws against imports of infringing goods. Complainants can take both civil and criminal action against offenders. U.S. industry reports that South Africa is becoming a transshipment point for pirated and counterfeit goods into the rest of Africa.

¶31. U.S. firms have complained that South Africa does not adequately protect safety and efficacy studies (also called "registration data") submitted to national authorities with applications for product approval. U.S. firms have claimed that these studies are unfairly "referenced" by competitors for the purposes of registering competing products.

¶32. South Africa is a member of the World Intellectual Property Organization (WIPO), but has yet to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. South Africa has acceded to the Stockholm Text of the Paris Convention for the Protection of Intellectual Property.

#### Software/Audio Visual IPR Issues

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¶33. Software piracy still occurs frequently in South Africa. In a study that examined 2004, the Business Software Alliance estimated that the piracy rate was 37 percent and that U.S. industry in South Africa lost an estimated \$91 million in sales. Piracy in the video and sound industry also continues to be a concern. U.S. industry estimates that piracy rates for the audiovisual industry rose from 15 percent to 50 percent from 2001 to 2005, caused mainly by the growth in imports of pirated optical disc products. The South African Federation Against Copyright Theft estimates that industry losses for 2005 will be in excess of \$55 million.

#### SERVICES BARRIERS

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#### Telecommunications

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¶34. Telkom's monopoly continues to present difficulties. Telkom has managed to keep telecom prices high and to stifle competition. Telkom has restricted the resale of telecommunications services through predatory pricing and legal challenges. Pending a lawsuit in the South African courts, Telkom has refused to pay a multi-million dollar contract with a U.S. telecommunications software company. By March 2005, Telkom had parlayed its market dominance into \$1.7 billion in operating profit on \$6.5 billion in sales. In 2005, the DOC sponsored two colloquiums to discuss measures to lower telecommunications prices. DOC intended to release an action plan before the end of ¶2005.

¶35. South Africa has adopted the WTO reference paper on pro-competitive regulatory principles and made commitments to the WTO on value-added telecommunications and basic telecommunications services. These commitments include a promise to license a second national operator

(SNO) to compete in long-distance, data, telex, fax, and privately leased circuit services no later than January 1, 2004. The Minister of Communications conditionally approved a license for the SNO in September of 2004, but disagreements between SNO shareholders over operational control and allocation of equity stakes have delayed the launch until 2006. The result has been that Telkom has enjoyed monopoly privileges well beyond its period of exclusivity, which ended in May 2002.

¶36. On February 1 2005, the Minister of Communications effected sweeping liberalization of the telecommunications sector. Mobile operators will now be allowed to use any fixed lines in the provision of their service, value-added network services (VANS) can be offered through infrastructure other than that which is owned by Telkom, and VANS providers are allowed to employ Voice Over Internet Protocols. In addition, private telecommunications network operators can sell spare capacity. On May 20 2005, the Minister approved supporting regulations for the licensing of VANS. These developments should help resolve past complaints by Internet Service Providers (ISPs) and VANS providers that Telkom has limited their access to Telkom's network.

¶37. In 2003, the Department of Communications (DOC) released a draft Convergence Bill, which industry analysts hope will simplify the existing legislative framework, empower the regulator, and open the telecommunications industry to greater competition. Following a highly critical public comment period, the DOC undertook to revise the bill. In 2005, the DOC released for comment its modified version, entitled the Electronic Telecommunications Bill. The revised bill and amendment is currently under debate in Parliament. Critics charge that the bill will increase the authority of DOC at the expense of ICASA and, therefore, is likely to incorporate greater political bias in future regulatory decisions. They believe that ICASA should be strengthened to better carry out its regulatory mandate.

¶38. One U.S. company withdrew from the South African market in 2005 after having made a substantial investment in an earth station for mobile satellite services, only to have ICASA demand an excessively high license fee. In late 2005, ICASA sought assistance on pricing models for different services.

#### Other Services -----

¶39. The United States and the Government of South Africa met in August 2005 to discuss a possible Open Skies Agreement. Open Skies agreements provide for open route rights, capacity, frequencies, designations, and pricing, as well as opportunities for cooperative marketing arrangements, including code-sharing and airline alliances. At the talks, South Africa argued for incremental liberalization of the existing 1996 bilateral air transport agreement. South African Airways (SAA), the national airline wholly owned by the state owned enterprise Transnet, had previously registered its concern about U.S. airlines exercising "fifth-freedom rights" in Africa (i.e., carrying passengers to and from countries other than the United States and South Africa), which could impinge on SAA's strategic regional market. At this time, the two sides have no plans to re-engage on Open Skies.

¶40. U.S. financial services providers have expressed



ongoing concerns about the implementation of the Black Economic Empowerment (BEE) charter for the financial services sector. In 2003 and 2004, several of these providers participated in the negotiations with government, labor, and industry stakeholders that resulted in the drafting of the BEE Financial Services Charter. Since, the Department of Trade and Industry (DTI) has released generic scorecard targets, including a 25 percent equity ownership target. It is unclear whether this will affect the Financial Services Charter, which currently permits foreign financial institutions to substitute equity ownership with financing and/or investing in BEE companies or projects. DTI wants to finalize all BEE Codes of Good Practice, including those on multinational corporations, by the end of 2006.

## INVESTMENT BARRIERS

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### Uncertain Implementation of the BEE Act

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¶41. In January 2004, President Mbeki signed into law the Broad-Based Black Economic Empowerment (BEE) Act of 2003, giving force of legislation to the government's Black Economic Empowerment strategy. The intention of black economic empowerment is to move the historically disadvantaged majority population in South Africa into the mainstream of the economy. U.S. businesses strongly support the goals of BEE, and many have a long history of instituting human resource management, procurement, and enterprise development policies in South Africa that are consistent with BEE objectives. These businesses hope BEE implementation will allow them to continue these policies and to participate fully in South Africa's economy. However, the government's BEE strategy has been evolving very slowly, through a series of policies on human resource development, management, procurement, enterprise development (investment in black-owned firms), and equity ownership. Twenty-nine industry charters have been negotiated or are being negotiation with government in such areas as accounting, agriculture, chemicals, cosmetics, clothing and footwear, construction, engineering services, financial services, forestry, health, information and communications technology (ICT), liquid fuels, mining, property, tourism, marketing, transportation, liquor, and wine. Conflicting precepts among these charters and questions about implementation and verification programs have created considerable uncertainty for both local and foreign firms.

¶42. The BEE Act directs the Minister of Trade and Industry to develop a national strategy for BEE, issue implementing guidelines in the form of Codes of Good Practice, encourage the development of industry-specific BEE charters, and establish a National BEE Advisory Council to review progress in achieving BEE objectives. Codes of Good Practice, formulated by the Department of Trade and Industry (DTI), are intended to harmonize existing and future industry BEE charters. On October 31, 2005, the Minister released the final version of the first-phase Codes of Good Practice for Broad-based Black Economic Empowerment. These include codes on the BEE framework, BEE in equity ownership, and BEE in management. The codes include a new generic scorecard with suggested BEE targets for equity ownership, management, purchasing, and employment. Questions remain about interpretation of the codes, and the measurement and verification of BEE adherence. The draft Codes of Good Practice on multinational companies and BEE purchasing have yet to be distributed. DTI expects to release them along with draft Codes of Good Practice on employment equity, skills development, and enterprise development in early 2006. DTI wants to promulgate the new Codes of Good Practice in the Government Gazette under Section 9(1) of the BBEE Act 53 of 2003 by the end of 2006.

¶43. Because of their corporate structure, most U.S. businesses cannot easily transfer equity to BEE shareholders, and are concerned that mandatory equity transfers could - for very practical reasons - put the future of their South African operations in doubt and/or deter further investment. U.S. businesses hope the Codes of Good Practice on multinational corporations and BEE purchasing will establish flexible criteria that allow them to meet BEE objectives through multiple means, and accommodate those companies that have concerns about BEE equity requirements. USTR and the U.S. Embassy in Pretoria have been closely monitoring the ongoing development and implementation of South Africa's BEE policies and have maintained a continuous dialogue with the South African government and U.S. industry on BEE.

#### ANTICOMPETITIVE PRACTICES

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##### Ownership Patterns

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¶44. There is a historical legacy of concentrated ownership in some sectors of the South African economy.

Between 1961 and 1994, the apartheid government denied a large portion of the South African population from participating actively in the economy by disallowing them the opportunity to gain higher education and managerial experience, or to take advantage of entrepreneurial and investment opportunities. Apartheid policies also prohibited successful companies such as South African Breweries, AngloAmerican, DeBeers, and SASOL from investing abroad. Therefore, these enterprises expanded their businesses domestically in horizontal and vertical conglomerates. As a result, major South African companies entangled themselves into complex ownership structures and a series of crossholdings that resulted in the accumulation of considerable power in the South African marketplace. This situation has changed considerably since 1994, as many of the major players have disentangled their businesses, got back to basics, expanded internationally, and even listed on foreign stock exchanges. Together with more effective competition laws and BEE initiatives to enlarge the share of black participation in the economy, South Africa's business environment has become more transparent, more competitive, and more open to new entrants, including U.S. companies, than it was ten years ago. The exceptions have been energy, transportation, and telecommunications, sectors still dominated by state-owned or state controlled monopolies.

#### ELECTRONIC COMMERCE

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¶45. The Electronic Communications and Transactions Law, effective July 31, 2002, governs all companies that conduct electronic commerce in South Africa. The law was designed to facilitate electronic commerce, but may instead increase the regulatory burden and introduce an unacceptable level of uncertainty for some businesses. The law requires government accreditation for certain electronic signatures, takes government control of the ".za" domain name, and requires a long list of disclosures for web sites that sell via the Internet.

¶46. The South African Law Reform Commission has submitted draft legislation and discussion documents on privacy and data protection for public comment by February 28, 2006. The aim is to bring South Africa closer to international standards and to provide citizens with legal recourse to protect personal information, which is currently protected by the Constitution and various provisions in other legislations. The South African Law Reform Commission plans to hold a series of

workshops on the legislation in February 2006. Legislation may negatively impact the ability of South African and foreign companies to receive and send trans-border flows of personally identifiable data, thereby weakening cross-border e-commerce and services between South Africa and its trading partners.

#### OTHER BARRIERS

##### Transparency, Corruption and Crime

¶47. South African law provides for prosecution of government officials who solicit or accept bribes. Penalties for offering or accepting a bribe may include criminal prosecution, monetary fines, dismissal from government employment, or deportation (for foreign citizens). South Africa has no fewer than ten agencies engaged in anticorruption activities. Some, like the Public Service Commission, Office of the Public Protector, and Office of the Auditor-General, are constitutionally mandated to address corruption as only part of their responsibilities. Others, like the South African Police Anti-Corruption Unit and the Directorate for Special Operations (more popularly known as the "Scorpions"), are dedicated to combating crime and corruption. High rates of violent crime, however, are a strain on capacity and make it difficult for South African criminal and judicial entities to dedicate adequate resources to anti-corruption efforts.

¶48. During the last few years, crime has been a far more serious problem than either corruption or political violence when it comes to being an impediment to, or

raising the cost of doing business in South Africa. The South African Police have not been effective or well accepted in many communities because of their historical role in enforcing minority rule. The lack of training and internal crime and corruption within the police force has only compounded the situation. Although statistics on violent crime have declined in recent years, the perception that crime is a serious problem remains high. The level of crime has deterred some U.S. companies from doing business in South Africa.

¶49. New laws, such as the Promotion of Access to Information Act, signed into law in February 2000, have helped to increase transparency in government during the last few years. The Public Finance Management Act, which became effective on April 1, 2000, helped to raise the level of oversight and control over public funds, and improve transparency in government spending, especially with regard to off-budget agencies and state owned enterprises. Notwithstanding these efforts, businesses complain about the lack of certainty and consistency in interpreting and implementing some government policies.

¶50. On April 28, 2004, President Mbeki signed "The South African Prevention and Combating of Corrupt Activities Act" (PCCAA) into law. The PCCAA, inter alia, defines graft, bars the payment of bribes by South African citizens and firms to foreign public officials, and obliges public officials to report corrupt activities. One shortcoming of the Act has been its failure to protect whistleblowers against recrimination or defamation claims. This is now receiving some political attention.

##### Immigration Laws

¶51. For a number of years, U.S. and other foreign companies have complained that South African immigration legislation and the application of the law made it extremely difficult to get work permits for their foreign

employees. Previously, South Africa relied on the apartheid-era Aliens Control Act, which did not take into account international developments and the opening up of the South African market. A new immigration law entered into force on May 31, 2002. The legislation establishes yearly quotas for granting work permits to foreigners. Local businesses have criticized the new law for creating uncertainty because the quota system sets limits on the number of skilled people that may enter the country in particular categories. Under a separate dispensation, corporate investors may make blanket applications for the people they need. It is not clear whether these corporate permits fall within the quota system. The Minister of Home Affairs has said that the new law is an enormous improvement over previous legislation, and places South Africa on a par with other countries, especially with respect to investors and intra-company transfer permits. The Minister for Trade and Industry and the Minister of Finance have suggested that the South African government may need to revise the law to acquire critically needed skills in South Africa.

TEITELBAUM